BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: DAVIS BROTHERS FRAMING, INC 8780 Prestige Court Rancho Cucamonga, CA 91730 Employer	Docket Nos. 05-R3D3-634 through 636 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

Between September 22, 2004, and February 8, 2005, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Davis Brother's Framing (Employer) at the northwest corner of Miller Avenue and Almeria Avenue in Fontana, California.

On February 8, 2005, the Division issued three citations to Employer, each of which alleged a single violation. Employer filed a timely appeal contesting the citations.

This matter came on regularly for hearing on June 22, 2007, before an Administrative Law Judge (ALJ) for the Board and the matter was submitted that day.

The ALJ rendered a decision on July 19, 2007, denying Employer's appeals, including the appeal from the second and third citations, which were classified as serious. (The appeal to citation one was withdrawn by Employer.) Citation 2 alleged a serious violation of section 1626(e) for failure to guard stairways with standard railings.[1] Citation 3 alleged a serious violation of section 1716.2(g) for failure to provide fall protection to framers installing roof sheathing. The ALJ found evidence supporting the occurrence of both violations, and that both were properly classified as serious, because of the

[1] Unless otherwise specified all section references are to Title 8, California Code of Regulations.

likelihood of serious injury occurring from falls from 9 ½ feet and 15 feet respectively.

On August 22, 2007, Employer filed a Petition for Reconsideration. On September 17, 2007, Employer filed a Motion for Leave to File a Supplemental Petition for Reconsideration asserting the hearing record produced by the Appeals Board was incomplete, and requesting a complete copy. This motion was granted by the Board on October 11, 2007, and the Board granted the Petition for Review pending the submission of the supplemental brief. A review of the hearing tapes shows the hearing began at 9:56 a.m., and concluded at 12:26 p.m. There was one recess, and tape changes, for a total of 2 hours and 27 minutes of hearing time. All evidence relied on by the parties in the closing arguments was contained in the hearing as recorded on the tapes.

No substantive, supplemental brief was ever submitted by Petitioner. The Division filed no Answer.

EVIDENCE

During its inspection of Employer's worksite, the Division inspector took pictures and interviewed employer representative William Sydney, construction foreman, and the General Contractor's representative, David Traphegan. The location was a residential subdivision under construction. The Employer is a residential framing contractor. Framing employees were observed and photographed installing facia board and sheathing on the second story roof of several buildings without wearing fall protection. An employee informed the inspector that fall protection was "in the truck." The evidence was un-contradicted that none of the employees observed or photographed were wearing fall protection. The roof height exceeded 15 feet.

While accompanied by the Employer's foreman, Bill Sydney, the inspector observed stairways inside the buildings that were in excess of 9.5 feet high and lacked railings. He photographed one such stairway. Employees were working on the second floor. They were not involved, at the time of the inspector's observations, in framing the stairway.

The inspector testified he had inspected or assisted in inspecting between 30 – 50 falls of approximately 9.5 feet, the vast majority of which involved serious injuries requiring hospitalization in excess of 24 hours, or death. He also testified that he inspected more than ten falls from approximately 7.5 feet, and all of them resulted in serious bodily injury which he defined as requiring hospitalization for more than 24 hours for treatments such as surgeries.

ISSUE

1. Was the correct safety order cited by the Division for a construction framing employer which exposed one or more of its employees to a fall hazard of 9.5 feet while they were not engaged in the activity of framing?

2. Is the Division witness's testimony that he has, in the course of 22 years as an inspector for the Division, observed numerous serious injuries as a result of falls from 9.5 feet sufficient evidence on which an ALJ can rely to conclude the lack of fall protection violations found herein were serious as defined in Labor Code 6342?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. THE CORRECT SAFETY ORDER WAS CITED BY THE DIVISION FOR THE EXPOSURE TO THE FALL HAZARD CREATED BY A LACK OF STANDARD RAILING ON A STAIRWAY WITH AN EXPOSED SIDE WHOSE HEIGHT EXCEEDED 9.5 FEET.

Petitioner asserts that two safety orders apply to the same hazard, and so the Division must cite a more specific safety order. This argument relies on a faulty premise. Sections 1626(e) and 1716.2 do not address the same hazard. Section 1626(e)[2] concerns railing requirements for all stairways, regardless of the nature of the work being done at the time of the exposure. Section 1716.2 requires fall protection be implemented while workers are actively engaged in the specific framing work stated in each subsection of that Safety Order. Read together, these two sections make it clear that while framers are actually framing, section 1716.2 applies, but if they are not actively engaged in the specific acts identified in any subsection of section 1716.2, then those subsections do not apply to allow exposure to up to 15 foot falls. Instead the requirements of section 1626(e) apply.

It is not the case that all framing company employees, regardless of where they work or what they do, need only be protected from fall hazards exceeding 15 feet. Nothing in the two safety orders requires us to read section 1626 (e) with such restriction.

Looking at the activity engaged in by the employee at the time of the exposure is a reliable method of determining which safety order applied. (*Carver Construction*, Co., Cal/OSHA App. 77-378, Decision After Reconsideration (March 27, 1980).) If the employee is not engaged in the work covered by the specific safety order at the time of the exposure, then the more

[2] This Safety Order has been amended since the decision was issued. The new section states: (a) (1) Stairways shall be at least 24 inches in width and shall be equipped with stair rails, handrails, treads and landings. Under either section, the evidence establishes a railing was need at least on the open side of the stairway.

specific safety order does not control. (*Rex Moore Electrical Contractors and Engineers,* Cal/OSHA App. 07-4314, Denial of Petition for Reconsideration (November 4, 2009).) Section 1716.2 confines its scope and application to exposures occurring while in the course of "residential-type framing activities, i.e. joists or trusses resting on stud walls."

Every section of 1716.2 begins with qualifying language limiting its application to employees actively engaged in specific framing activities.

e) "Work on Top Plate, Joists and Roof Structure Framing."

(1) "**When employees are walking/working on top plates,** joists, rafters, trusses, beams or other similar structural members over 15 feet above the surrounding grade or floor level below, fall protection shall be provided by scaffolding, guardrails, a personal fall protection system, or by other means prescribed by CSO Article 24, Fall Protection. Exceptions: (A) **When employees are walking/working on securely braced joists,** rafters or roof trusses on center spacing not exceeding 24 inches, and more than 6 feet from an unprotected side or edge, they shall be considered protected from falls between the joists, rafters or roof trusses. (A) **When employees are walking/working on securely braced joists,** rafters or roof trusses on center spacing not exceeding 24 inches, and more than 6 feet from an unprotected side or edge, they shall be considered protected from falls between the joists, rafters or roof trusses.[3]"

[3] The remainder of section 1716.2 is similarly qualified: "(B) **When installing floor joists**, employees shall be considered protected from falls up to and including 15 feet above the surrounding grade or floor level below when standing on or working from joists laid on their sides on the top plate on center spacing not exceeding 24 inches when walking/working within 24 inches of the top plate or other structural support. (Emphasis added)

(f) Work on Floors and Other Walking/Working Surfaces. **When working on floors and other walking/working surfaces that will later be enclosed by framed exterior walls,** employees directly involved with the layout and construction of framed stud walls shall be protected from falling by standard guardrails as specified in section 1620 around all unprotected sides or edges, or by other means prescribed by CSO Article 24, Fall Protection, when the floor or walking/working surface is over 15 feet above the surrounding grade or floor level below.

(g) Work on Starter Board, Roof Sheathing and Fascia Board.

(1) **When installing starter board, roof sheathing, and fascia board,** employees shall be protected from falling by scaffolding, guardrails, personal fall protection systems, or other means prescribed by CSO Article 24, Fall Protection as follows: …
"

The 15 foot allowance only applies when the employee is directly involved in these framing activities. The employee observed standing at the top of the stairs was not engaged in these framing activities. The specific safety order therefore does not apply. The correct safety order was cited, and there is substantial evidence in the record to support the conclusion that the violation occurred.

2. TESTIMONY OF THE DIVISION WITNESS CONFIRMING THE NATURE OF THE INJURIES THAT HAVE OCCURRED IN THE PAST WHEN EMPLOYEES ARE INJURED OR EXPOSED TO UNGUARDED HEIGHTS OF 9.5 FEET OR MORE PROVIDES SUBSTANTIAL EVIDENCE TO SUPPORT THE CONCLUSION THAT BOTH VIOLATIONS FOUND WERE PROPERLY CLASSIFIED AS SERIOUS.

Classification of the violations as serious was correct. A serious violation exists if:

> "There is a substantial probability that death or serious physical harm could result from a violation [where]. . . either of the following could result in death or great bodily injury: . . . practices, means, methods, operations or procedures which have been adopted or are in use at the place of employment. LC 6432(a)."
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> "[S]ubstantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation. (Lab. Code 6432(c).)"

Here, the Division witness testified that in 22 years of investigating employers for violations of the Act, he personally investigated or accompanied colleagues on 35-50 accidents involving falls of 9.5 feet or more, all of which involved either death or injury requiring hospitalization in excess of 24 hours (i.e. serious injury). He provided eyewitness testimony of the severity of the kinds of injuries the Safety Order protects against (i.e. falls from heights). Although Petitioner posits that there is no "statistical probability" evidence to support the conclusion of a substantial probability of serious injury if an accident were to occur because of a violation, this is not required to support the serious classification. (*Dennis J. Amoroso Construction Co., Inc.*, Cal/OSHA App. 98-4265, Decision After Reconsideration (Dec. 20, 2001); *Contra Costa Electric, Inc.*, Cal/OSHA App. 90-470, Decision After Reconsideration (May 8, 1991).) Rather, the Labor Code and our precedents require that an opinion about substantial probability be based on a valid evidentiary foundation such as expertise on the subject, reasonably specific scientific evidence, experience-based rationale, or generally accepted empirical evidence. (*R. Wright & Associates, Inc.,* Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

The experience-based rationale of the division witness concerning the substantial probability of serious injury should the violation result in an accident supports the Decision.

DECISION AFTER RECONSIDERATION

The ALJ's decision, including penalty calculations, is affirmed and is reinstated.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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